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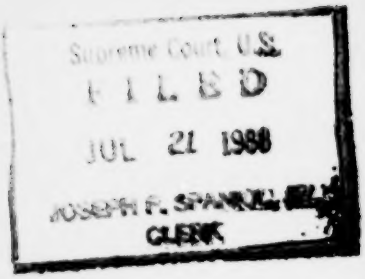

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN CARMEN CINCOTTI,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Where the only evidence presented to the grand jury in support of a particular element of the crime subsequently charged in one count of an indictment is later found to be incorrect, is a defendant entitled to a dismissal of the indictment, or at least that count to which the incorrect evidence pertained?

2. Does the application of a ruling of this Court making certain conduct illegal which conduct was said not to be illegal by the Circuit Court of Appeals at the time of its commission violate the ex post facto clause of the Constitution?

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TREATIES AND TEXTS

The petitioner John Carmen Cincotti respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the First Circuit, described below.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit, decided May 24, 1988, has not yet been reported. A copy thereof appears in the Appendix hereto.

JURISDICTION

The Judgment of the United States Court of Appeals for the First Circuit was entered on May 24, 1988. The Petition for Certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28

U.S.C. 1254 and Rule 17 of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. Article I, Section 9, Clause 3 of The Constitution Of The United States.

   No Bill of Attainder of Ex Post Facto Law shall be passed.

2. 18 U.S.C. 1962(c)

   It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

3. 18 U.S.C. 1962(d)

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

4. 18 U.S.C. 1955(a)

> Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

The petitioner, John Carmen Cincotti, (hereinafter referred to as Cincotti) together with six others, was named in a thirteen-count indictment returned by the grand jury in the United States District Court for the District of

Massachusetts. In Count I Cincotti was charged with conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act; (hereinafter referred to as RICO); in violation of 18 U.S.C. 1962(d). In Count II he was charged with the substantive violation of RICO; 18 U.S.C. 1962(c). And, in Count IV he was charged with conducting an illegal gambling business; in violation of 18 U.S.C. 1955.

The defendant, Ralph Lamattina is a fugitive. The defendants, Richard Ernest Gambale, Peter James Limone and John Louis Orlandella, changed their plea to guilty prior to trial. Cincotti and the two remaining defendants, Jason Brian Angiulo and William Joseph Kazonis, went to trial before a judge and jury.

During the middle of the trial Cincotti filed a motion to dismiss alleging a Fifth Amendment violation because of a substantive amendment to the indictment. The motion was denied.

The jury returned guilty verdicts against Cincotti on all counts. From the judgments of conviction, Cincotti appealed to the United States Court of Appeals for the First Circuit. The Judgment of Conviction was affirmed on May 24, 1988.

The pertinent facts are as follows:

The government alleged that an organization known as the Mafia existed throughout the United States; that it existed in families in each of the major cities in the country; that Boston was a part of the Raymond Patriarca family of

New England which was headquartered in Providence, Rhode Island; and, that Cincotti was a soldier and a made member of the Mafia (Tr. 13-17-20).

Under RICO the government, as it was required to do, alleged that Cincotti engaged in a pattern of racketeering activity, or the collection of an unlawful debt. A pattern of racketeering activity requires at least two racketeering acts, sufficiently related to constitute a pattern. The government charged Cincotti with only two racketeering acts; (1) conspiracy to murder Harvey Cohen, and (2) conducting an illegal gambling business, to wit: poker games. To meet its burden, the government offered the following evidence:

In May of 1980 Special Agent Shaun Rafferty of the Federal Bureau of Investigation commenced a gambling investigation which focused on 51 North Margin Street in the North End Section of the City of Boston (tr. 15-89). At some point he prepared an affidavit in support of a request made by the government for an order authorizing electronic surveillance of the 51 North Margin Street premises (Tr. 15-90). The order was issued by the Court. On February 11, 1981, pursuant to the order, agents of the F.B.I. broke into the premises during the early morning hours and installed the necessary equipment for electronic surveillance (Tr. 15-103). Thereafter, conversations on the premises were recorded.

The last interception pursuant to this order occurred on February 26, 1981; the order terminated on March 1 (Tr. 15-103). On March 27, 1981 another order for surveillance was obtained (Tr. 15-152). Because the microphones had been removed after termination of the first order, the agents, on April 1, 1981, again broke into the premises to install equipment (Tr. 15-154). More recordings were made pursuant to this order.

On April 27, 1981 a third order was signed authorizing fifteen more days of interceptions (Tr. 15-165).

Numerous recordings were made of conversations at 51 North Margin Street. As the agent in charge of the investigation, Special Agent Rafferty took custody of the tapes after each

shift in which agents had worked making the recordings (Tr. 15-100). And, he listened to and reviewed all of the tapes (Tr. 15-176). In August of 1981, Rafferty was transferred to New Hampshire, after which Special Agent Merita Hopkins took over the investigation (Tr. 15-177-178).

In the main, evidence as to whose voice appeared on the tape recordings came from F.B.I. Agents who gave their opinion as to who was speaking on a particular tape. Transcripts were made of each tape with an agent designating each speaker. The name Cincotti appeared on many of the transcripts as a participant in a particular recorded conversation. In order to identify particular conversations, each tape and

transcript was given a number.

In early 1980 Special Agent Rafferty overheard Cincotti engaged in a conversation on a street in the North End. This conversation was approximately two minutes in duration. On May 18, 1981 the F.B.I., pursuant to a search warrant, conducted a raid on the North Margin Street premises. Special Agent Rafferty spoke with Cincotti on this occasion. As a result of these two incidents, Rafferty felt that he had become familiar with Cincotti's voice (Tr. 15-179). Rafferty listened to all of the tapes and reviewed the transcripts. He testified that he believed that Cincotti was the speaker (Tr. 15-185). Rafferty was the only person who identified Cincotti's voice as being on any of the tapes.

The search warrant for the 51 North Margin Street premises was executed on May 18, 1981 (Tr. 15-37). Cincotti was present at the time, seated at a table in the large room. Photographs were taken showing where everybody was positioned at the time of the search. A total of $9,583.00 was taken from the person of Cincotti. The money was in different packages; some with notations (Tr. 18-41-42). Part of the money was the payroll for the Chinese Restaurant in East Boston owned by Cincotti. He asked the agents not to take this money (Tr. 18-56).

Also seized from the person of Cincotti were two handguns (Tr. 18-59). However, he had a permit to carry the guns which had been issued by the Police Department in his home town of Wayland

(Tr. 18-73).

Special Agent Arthur Eberhart of the F.B.I. was found to be qualified as an expert on gambling businesses. He reviewed all of the tapes and transcripts for the purpose of determining whether or not a gambling business was being conducted at 51 North Margin Street (Tr. 18-139-140). Eberhart concluded that an organized high stakes poker game was taking place; and, that at least thirteen people were involved in running the game, including a card room manager, several dealers, errand people and owners or financial backers (Tr. 18-145). Eberhart was of the opinion that Cincotti was the card room manager (Tr. 18-150); the financial backers were Nicola Giso, Samuel Granito, Ralph Lamattina, Larry

Zannino and Gerry Angiulo (Tr. 18-159); and, the dealers were Steve, Freddy, Chubby and Vinny (Tr. 18-160).

Cincotti presented a defense. He called witnesses who explained the poker games and how and why they were run; and, that it was not a business. Rather, it was a social gathering every Monday and Thursday evening.

Henry Anzilotti lived at 66 North Margin Street. He worked as a supervisor at the Suffolk County Probate Court (Tr. 40-40). Anzilotti testified and produced documents showing that the North End Italo-American Club was formed and chartered by the Secretary of the Commonwealth in 1972. Anzilotti was a director (Tr. 40-41-42). The club was formed for the purpose of having a place

to socialize and hold parties. Socializing included playing cards (Tr. 40-43). They played cards on Mondays and Thursdays (Tr. 40-44).

Anzilotti had known Cincotti all of his life, and knew him to be a member of the club (Tr. 40-48).

Vincent Roberto, another member of the club, described for the jury how the poker games worked. He also explained that it was the poker games which financed the expenses of the club. The games, for the most part, were friendly; but on occasion, they were considered high stakes. There were standard rules for betting. The games were generally seven card stud, and a player could bet five dollars on the first card. However, if someone wanted to raise, they would

have to double it; so, the next bet would be ten dollars. And on it went. Generally, there was a ceiling. For the most part, the maximum bet did not exceed three hundred and twenty dollars. However, on occasion, when people like Larry Zannino and Ralph Lamattina played, the ante would go up (Tr. 40-55-69).

Even in the high stakes games it did not mean that everybody bet the maximum. There was a system whereby players could remain in the game but could only win or lose the amount they were in for. If, for example, a player had only three hundred and twenty dollars, he could play all in. This meant that he could play for no more than that amount. If there were seven players in the game and if he had the best hand, he could only collect

three hundred and twenty dollars from each player in the game. The second best hand among those players who played for more would win the remaining money (Tr. 40-60-63).

Roberto explained what was called a "rake". He told the jury that the rake was the amount of money taken out of each pot; that it never exceeded fifteen dollars; that the purpose was to take care of expenses, i.e., pay for food or whatever; that when expenses were met the rake would cease; and there was no profit from the rake (Tr. 40-62-64).

Sherman Feller, the public address announcer for the Boston Red Sox, gave essentially the same testimony (Tr. 42-11-18). So, too, did Anthony Stancato (Tr. 42-69-88); Leonard Tammaro (Tr. 43-

2-17); Anthony Russo (Tr. 43-57-61); and, Alfred Silvestri (Tr. 43-64-77).

The defense also called its own gambling expert in the person of Jack Strauss, a professional gambler from Texas. Strauss has played all over the world. And, in 1983 he won the World Poker Championship (Tr. 4-134-140).

Strauss testified that he has played in games where there was a "rake". He described a "rake" as a percentage of a pot taken by the house (Tr. 4-145). The percentage could be whatever the house wanted it to be, but anything over one percent would make it almost impossible for any player to win. The house would end up with everything (Tr. 40-146). Usually, there is a gripe about the rake (Tr. 40-147).

Strauss listened to all of the tapes and read the transcripts. Based on the tapes and the transcripts he opined that there was a high stakes game (Tr. 40-148). However, he was also of the opinion that there wasn't much of a rake (Tr. 40-149). The following reveals his reason:

> Q. Did I understand you to say that you formed the opinion that there was no rake?
>
> A. I finally got it understood that they took off enough to pay for the --I saw where they were drinking brandy and

a l l - - everyone s e e m e d q u i t e satisfied with the food, and they must have taken off enough to pay for that. But I don't see where--and I really am an expert, and I don't s e e h o w they could have been making any profit out of this.

Q. Well, why do you say that Sir?

A. Because you would have heard these p e o p l e g r i p i n g about it if t h e y h a d been taking off--they g r i p e d

> about everything else. They griped about the dealers and they cursed every-- (Tr. 40-149).

He also explained that if there was a rake they would have to compute the percentage; for example, two percent of $5,460.00. And, there was never any mention of this on the tapes (Tr. 40-150).

Strauss was also of the opinion that Cincotti was not the card room manager. As he explained, "I don't think there was any manager. It just looks like there was a bunch of people playing. I wouldn't say he fit in more as the manager than anybody else. It looks like whoever lost the last hand was running

these games" (Tr. 41-9).

One of the tapes reviewed by Agent Eberhart which led to his opinion was a tape designated 2M(c) (Tr. 18-152). This was a tape of a conversation recorded at North Margin Street on February 23, 1981. According to the transcript, the participants in the conversation were Cincotti and some unknown male. According to the transcript, Cincotti was telling the unknown male about a poker game which was for high stakes. Eberhart listened to the tape at trial. He opined that Cincotti was controlling the chips; and so, in his opinion, Cincotti was a supervisor (Tr. 19-19).

During the playing of the tape in Court, Eberhart was asked if he heard the name "Fifi" at any time. He testified

that he did not. (Tr. 19-17).

Special Agent Merita Hopkins was called as a defense witness. The tape, 2M(c), was playing during this testimony. Agent Hopkins then heard the name "Fifi" on the tape (Tr. 44-107). In fact, she heard it twice (Tr. 44-108). However, up to that time, she had never heard "Fifi" on the tape before, and she had listened to it periodically for five years (Tr. 44-109).

Another witness called by the defense was Alfred Silvestri. He testified that he was also known as "Fifi" (Tr. 43-65). The tape, 2M(c) was played during the testimony of Silvestri (Tr. 43-69). He testified that he remembered that particular game (Tr. 43-70). He remembered it because that was

the first time in his life that he had won all of the chips; and, that before or since, he had never had four sixes with three of them in the hole (Tr. 43-72). Silvestri also testified that a person named Abigail was dealing during that game, and present was Skinny Richie, Vinny Roberto and Ralph Lamattina (Tr. 43-71). Cincotti was not there (Tr. 43-71).

On February 26, 1981, at 8:14 p.m., a recording was made of a conversation at North Margin Street. The tape was designated 5M. The transcript of this tape was prepared by Special Agent Hopkins, but it was Special Agent Rafferty who identified one of the voices thereon as being that of Cincotti (Tr. 43-141). This tape and transcript

concerned a person identified as Richie receiving instructions about collecting debts from certain people. Rafferty had originally identified the voice giving the instructions as being that of Cincotti.

Excerpts from tape 5M were used in the affidavit prepared by Agent Rafferty in support of the further order of the Court on March 27, 1981 for continued surveillance. At this time Rafferty identified Cincotti's voice (Tr. 45-12). While Rafferty did not appear before the grand jury (Tr. 45-13), he did testify in 1985 in the Gennaro Angiulo trial where he identified the voice of Cincotti as being on tape 5M (Tr. 45-13-14). However, about a week prior to the instant trial, Rafferty reviewed the

tapes at which time he became uncertain as to whether or not Cincotti's voice was on tape 5M. For this reason, the government did not offer the tape into evidence.

The voice on tape 5M was not that of Cincotti. It was Stephen Bethoney, who testified to that fact, as well as the fact that he remembered the conversation (Tr. 45-61-62).

With respect to the charge that Cincotti conspired to kill Harvey Cohen, the government offered two tapes; tape 11M(VI) recorded on April 3, 1981, and tape 61M recorded on April 23, 1981.

Tape 11M(VI) was a conversation in which the government alleges Cincotti, Zannino, and Ralph Lamattina participated. Tape 61M was a

conversation in which at least four persons participated. The government says that in addition to Cincotti, there was Ilario Zannino, Ralph Lamattina and Dominic Isabella. Agent Rafferty was the only person to identify the voice of Cincotti as appearing on these tapes.

The defense also presented as a witness, Carolyn Kingston, a professional singer, voice teacher and voice therapist (Tr. 46-48). She was able to identify voice characteristics (Tr. 46-54). She never spoke with Cincotti, and could not testify about his voice characteristics (Tr. 47-13). She did, however, listen to tapes in which the government claims that Cincotti was a participant in the recorded conversations.

Ms. Kingston listened to Tape 11M(VI) and used the transcript, but the names of the speakers were deleted. In those instances where it was claimed that Cincotti was the speaker, the letter "Z" was inserted. Ms. Kingston did a voice profile on that person (Tr. 47-24). When she listened to Tape 61M the names on the transcript were deleted, and where Cincotti was claimed to be the speaker, the letter "Y" was used (Tr. 47-26). A voice profile was also done on this person (Tr. 47-27). Ms. Kingston was of the opinion that "Z" and "Y" were not the same person (Tr. 47-28).

Ms.Kingston did the same with Tape 5M and Tape 2M(c). On transcript 5M the letter "X" was used to designate where Cincotti was supposed to be the speaker,

and on transcript 2M(c) the letter "A" was used (Tr. 47-28). She was of the opinion that "X" and "A" were the same voice (Tr. 47-29). She was also of the opinion that "Z" was not the same as "X" and "A" (Tr. 47-29); and, that they were different from "Y" (Tr. 47-30).

With respect to Tape 61M, there were four lines in which Cincotti was designated as the speaker. Ms. Kingston opined that the first two lines designated "Y" in the place of Cincotti were the same voice. The third line of "Y" was indistinguishable which did not permit a conclusion. But the final "Y" was possibly the same voice that was designated "X" on Tape 5M and "A" designated on Tape 2M(c) (Tr. 47-28).

REASONS FOR GRANTING THE WRIT

I. BECAUSE CINCOTTI MAY HAVE BEEN CONVICTED ON THE BASIS OF FACTS NOT FOUND BY, OR NOT EVEN PRESENTED TO, THE GRAND JURY, THE DECISION OF THE FIRST CIRCUIT UPHOLDING THE ACTIONS OF THE GOVERNMENT IN DELETING AN OVERT ACT FROM THE INDICTMENT CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

The grand jury serves the dual function of determining whether or not there is probable cause to believe that a crime has been committed and that a particular defendant committed it, and protecting citizens against unfounded criminal prosecutions. United States v. Sells Engineering, Inc., 463 U.S. 418 (1983). And, in performing these duties, any indictments returned must be well-founded. United States v. Dionisio, 410 U.S. 1, 13 (1973); Brandenburg v. Hayes, 408 U.S. 665, 688 (1972).

In the instant case the grand jury was asked to determine whether or not there was probable cause to believe that Cincotti engaged in the collection of unlawful debts. In order to assist the grand jury in making its determination the prosecution played tape 5M for the body. Additionally, Special Agent Regii explained what was happening on the tape. He explained that the conversation involved Cincotti giving instructions to a person named Richie LNU on the collection of a debt from Joe Sheehan. It does not appear that any other evidence was presented for consideration by the grand jury on the charge of collection of unlawful debts. Therefore, the grand jury determination was based solely on tape 5M and Agent Regii's

explanation which included that Cincotti was the speaker.

The RICO indictment, both conspiracy and substantive counts, was in the alternative, i.e., that Cincotti engaged in two or more predicate acts of racketeering, or that he engaged in the collection of unlawful debts. As to the conspiracy count, the government included a specific overt act based on tape 5M.

During the course of the trial the government, unilaterally deleted the overt act. This was done after Agent Rafferty was no longer certain that the voice on tape 5M was that of Cincotti. In fact, the voice was not that of Cincotti. It was Stephen Bethoney.

The First Circuit was of the opinion that no overt act need be proved in order

to sustain a RICO conspiracy conviction; therefore, deletion of what was not necessary in the first place did not harm Cincotti. However, the First Circuit overlooked the fact that this evidence which formed the basis of the overt act was the only evidence of collection of an unlawful debt, which formed the basis of the alternative element for a RICO charge.

The trial jury convicted Cincotti on both RICO counts. However, it is not known if the convictions were based on the predicate acts of racketeering or collection of unlawful debt. Cincotti urged upon the Circuit that evidence as to both was insufficient as a matter of law to sustain a conviction. The argument was rejected. It could well be

that Cincotti was convicted on the alternative theory of collection of unlawful debt. If so, he was convicted on facts not found by, or not even presented to, the grand jury. This would violate the holding of this Court in Russell v. United States, 369 U.S. 749, 770 (1962).

This Court has held that an indictment may be valid even if all the evidence presented to the grand jury was hearsay. Costello v. United States, 350 U.S. 359 (1956). Further, an indictment is not affected by the fact that some evidence to support it, which was presented to the grand jury, was obtained illegally. United States v. Calandra, 414 U.S. 338 (1974). However, it does not appear that the precise issue raised

in the instant case has ever been presented to this Court. Here, the government presented erroneous evidence to the grand jury. Relying thereon, the jurors indicted Cincotti. At least, as to so much of the indictment that charges collection of unlawful debt, Cincotti is entitled to dismissal.

II. THE RULING OF THE FIRST CIRCUIT ON THE EX POST FACTO ISSUE IS IN CONFLICT WITH THIS COURT'S DECISION IN BOWIE V. CITY OF COLUMBIA, 378 U.S. 347 (1964).

On September 23, 1980 the First Circuit ruled that, "RICO was not enacted as an offensive weapon against criminals, but as a shield to thwart their depredations against legitimate business enterprises." United States v. Turkette, 632 F.2d 896, 906 (1st Cir. 1980). (Hereinafter Turkette I). All of the

facts committed by Cincotti which were alleged to violate RICO occurred between January and May of 1981. On April 27, 1981 Larry Zannino, a co-conspirator, was overheard speaking to Gennaro Angiulo about Turkette I and the fact that their organization was safe from prosecution because they were illegitimate. On June 21, 1981, this Court reversed the First Circuit. United States v. Turkette, 452 U.S. 576 (1981). (Hereinafter Turkette II). Therefore, specific allegations of RICO violations by Cincotti between September 23, 1980 and June 17, 1981 were not illegal under the existing law at that time in this Circuit.

In Turkette II this Court offered an expanded judicial interpretation of the RICO statute. The question presented

then is whether applying this Court ruling to events that occurred after the First Circuit opinion but before this Court's decision would violate the ex post facto clause of the Constitution.

In Bowie v. City of Columbia, 378 U.S. 347 (1964), this Court extended the ex post facto clause to judicial statutory constructions. In so doing, the court reversed a conviction based on a judicial expansion of a state trespass law. The decision was based on the, "fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred.'" Id., at 354 (quoting J. Hall, General Principles of Criminal Law 58-59 (2d ed. 1960). This Court held that the judicial expansion of the trespass statute deprived the

defendants of the fair-warning mandated by the Due Process Clause of the Fifth Amendment. Id. at 362.

In the instant case, there is no question that this Court's ruling in Turkette II expanded the boundaries of the RICO statute beyond what the First Circuit had previously decreed. The rationale of the Bowie case dictates that Cincotti's case runs afoul of the due process requirements insofar as a seemingly precise, and clearly defined, statute was broadened after the fact to make his conduct fall under RICO. The ex post facto clause clearly bars such a prosecution. As one commentator noted, "The few cases in point are in substantial accord that an act pronounced innocent in a prior decision interpreting

a statute or declaring a statute unconstitutional should not be rendered criminally punishable by a later overruling decision." Note, The Effect of Overruled and Overruling Decisions on Intervening Transactions, 47 Harv. L. Rev. 1403, 1407 (1934).

CONCLUSION

For the reasons stated above, the petitioner respectfully requests that certiorari be granted and the case set down for briefing and oral argument; or, in the alternative, that certiorari be summarily granted.

Respectfully submitted,

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